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In the

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID GORDON, SUPERINTENDENT,

Petitioners,

vs.

MICHAEL NEWDOW,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a public school district that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment.

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INTEREST OF *AMICUS CURIAE* [1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, and Guam. NSBA also represents the nation's 95,000 school board members who, in turn, govern more than 14,000 local school districts that serve more than 47 million public school students. NSBA is dedicated to the improvement of public education in America and has long been involved in broad-based efforts to find reasonable common ground regarding issues of religion in public schools.

NSBA was assisted in the preparation of this brief by two of its members, the Texas Association of School Boards (TASB) Legal Assistance Fund and the California School Boards Association (CSBA). TASB and CSBA are not-for-profit associations of more than 2,000 local school boards located in the states of Texas and California, respectively. TASB and CSBA are dedicated to the support and improvement of the public schools and the enhancement of student achievement.

SUMMARY

Throughout the Supreme Court's Establishment Clause jurisprudence, it is a constant principle that any challenged practice must be considered in its full context. In this case, the challenged practice is Elk Grove's policy

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

requiring recitation of the Pledge of Allegiance by willing elementary school students. Examination of the Pledge's full context demonstrates that the school district's policy comports with this Court's pronouncements regarding the Establishment Clause. This full context includes the text of the Pledge, the ceremonial use of the Pledge, and the inclusion of the Pledge as part of the school's curriculum.

The wording of the Pledge as a whole shows that it is a historically accurate reflection of the beliefs and statements of many of the founders of this nation. The Pledge neither suggests nor requires supplication to a deity, but, rather, is a statement of allegiance to the flag, a patriotic symbol.

As a ceremonial activity, the Pledge promotes both civic awareness and patriotism. This Court has recognized that the fundamental purpose of the public schools is to prepare children for their participation in society as citizens. In classrooms where children often come from enormously different backgrounds, the Pledge represents an opportunity to reflect on the fact that, although we are diverse people, we share a national identity as citizens who are committed to the promise of liberty and justice for all.

As an educational activity, the Pledge serves important pedagogical objectives. State-approved curricula from across the country show that the preferred method of introducing elementary-age children to concepts such as citizenship and liberty is through the study and recognition of symbols and customs, such as the flag and the Pledge. The Pledge lays a foundation for later, more complex learning about our constitutional history. As they do when teaching historical documents that may refer to a deity, educators use the Pledge to illuminate the political principles upon which the nation

was founded, not to instruct students that there is or is not a God.

Given the Pledge's historical, textual, and educational context, a student's exposure to the recitation of the Pledge by other students raises no Establishment Clause concerns. The conditions that might prompt the need for heightened sensitivity are not present. The entire focus of the activity is the flag, which students recognize as a patriotic symbol, not as a religious one.

The ostensibly simple solution for some critics of the Pledge is to eliminate the words "under God" from the Pledge. This is not the question before the Court, and this solution is not simple at all. Such parsing invites and practically guarantees future litigation against school districts in matters of educational programming.

This Court has held that, as a general matter, the public schools have broad discretion in the management of the curriculum and that courts may not intervene unless the challenged practice directly and sharply implicates basic constitutional values. In this case, the Pledge of Allegiance, viewed in its full context, is a constitutionally permissible patriotic exercise. The Court should reverse the judgment below.

ARGUMENT

I. Examination Of The Pledge Of Allegiance In Its Full Context Demonstrates That It Serves Legitimate Educational And Ceremonial Purposes Within The Public Schools.

A. This Court's Jurisprudence Demonstrates That Practices Challenged As Violative Of The Establishment Clause Must Be Considered In Their Full Contexts.

Throughout the Supreme Court's Establishment Clause jurisprudence, it is a constant principle that any challenged practice must be considered in its full context. Therefore, a challenge to the voluntary recitation of the Pledge of Allegiance by schoolchildren cannot focus only on the words "under God" or, in fact, only on the Pledge itself. A court faced with such a challenge must consider the entire Pledge in the context of the school's curriculum and educational practices as a whole to make an accurate determination of whether the school's use of the Pledge offends the Establishment Clause.

The Court has made clear that simply barring the word "God" from schools is not a tenable application of the Establishment Clause. Instead, any challenged practice must be considered on its own merits, and in its full context. Thus, "[e]very government practice must be judged in its unique circumstances to determine whether it endorses religion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668 at 694 (1984) (O'Connor, J., concurring)).

As the Court noted in *Lynch*, to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. The Court must "examine the history, language, and administration" of a statute or practice as a whole "to determine whether it operates as an endorsement of religion." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).[2] Once the context of the challenged practice is determined, the proper question is whether the reasonable observer, with knowledge of the context, would think that the state has endorsed religion. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) ("[W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.") (O'Connor, J., concurring).

The Court has recognized a variety of types of context that must be considered in determining whether there is an Establishment Clause violation. First, and perhaps most obvious, there is physical context. The physical context in which a crèche, menorah, or cross was placed was emphasized in *Allegheny*, in *Lynch*, and (by

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[2] Although the considering and balancing of these various facts makes Establishment Clause determinations more complex than an outright ban on religious language or mention of God would be, it is consistent with the balancing that is accepted across various areas of constitutional law. *See, e.g., Allegheny*, 492 U.S. at 606 ("we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements *in the particular context*" (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (emphasis added in *Allegheny*).

the concurrence) in *Pinette*.[3] *Allegheny*, 492 U.S. at 596-600, 613-16; *Lynch*, 465 U.S. at 679-81; *Pinette*, 515 U.S. at 780-81 (O'Connor, J., concurring). The Court recognized that a crèche—a religious symbol—sends a different message when it is included as part of a general holiday display than when it is erected by itself in the main public area of a courthouse. Similarly, a menorah standing alone may send a different message than one that is part of a larger display. To view only the religious sections of a display is error because it distorts the message sent by a display as a whole. In addition, to ignore the larger context of a display—for example, whether the crèche is situated outdoors in a public park or as the centerpiece of a courthouse—would result in an inaccurate determination of a display's potential for endorsement.

The entirety of a challenged government program or practice constitutes a second type of context. For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-95 (1993), the Court noted that the use of a public school facility after school hours by a group that intended to present religiously oriented programs must be considered in the context of the use of the facility by a wide range of groups, both religious and secular. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8-11 (1993), the Court considered the provision of an interpreter under the Individuals with Disabilities Education Act to a deaf student who attended a religious school only within the context of the program as a whole, which provided many interpreters—the majority of whom would likely accompany students to non-religious schools. In both of

[3] In *Lynch*, the Court noted also that the "context of the Christmas season" must be recognized as a factor that would color the impression of the reasonable observer. *Lynch*, 465 U.S. at 679.

these cases, as well as in other cases involving neutrally-awarded benefits that flowed to religious schools,[4] the Court considered the program as a whole to be the proper context in which to view any specific use of a facility or grant of a benefit. The Court did not look only at the showing of a religiously oriented film at a school facility or the presence of a government-paid interpreter at a religious school. Such a narrow view would lead to a distorted perception of the message being sent to a reasonable, informed observer. Viewing these programs as a whole, the Court found each of these specific benefits to religion was the incident of the neutral opening of a public forum or the neutral award of benefits to students. It is this neutrality—evident when each program is viewed as a whole—that prevents a message of endorsement from being perceived by the reasonable, informed observer.[5]

This Court has made it clear that a school's curriculum also is the type of program that must be viewed as a whole to provide the context for any one item being taught. In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), while finding that a Kentucky statute that required the posting of the Ten Commandments on schoolroom walls violated the Establishment Clause, the Court stated that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used

[4] *See Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481 (1988); *Mueller v. Allen*, 463 U.S. 388 (1983).

[5] This neutrality can also affect the perception of the physical context of a challenged display. *See Pinette*, 515 U.S. at 781 (O'Connor, J., concurring) ("[T]he fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Ohio Statehouse.").

in an appropriate study of history, civilization, ethics, comparative religion, or the like." Courts of appeals also have recognized the necessity of viewing a curriculum as a whole. *See, e.g., Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 689 (7th Cir. 1994) ([I]n evaluating the primary effect of the use of the [reading] series, we must 'focus on the entire series, not simply the passages the parents find offensive because to focus exclusively on the religious component of any activity would inevitably lead to its invalidation.'"); *see also Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) (concluding that choir program's use of religious songs did not violate the Establishment Clause; one cannot focus "solely on the religious component of [a] classroom activity"); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-08 (5th Cir. 1995) (examining school context and concluding that the use of religious music in a school choral program was constitutional but that prayer before a basketball game was unconstitutional). Focusing on a single element of a school's program is as distorting as considering only one part of a holiday display.

Finally, the Court has recognized that the "history and ubiquity" of a practice may be one contextual factor that makes it less likely that a reasonable observer would perceive state endorsement of religion. While "[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use," *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970), the history and continuous usage of a practice cannot be ignored. Thus, the Court has determined that certain practices, such as non-sectarian prayers at the opening of a legislative session, do not convey messages of endorsement of religion. *Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983). These practices, rather, "serve, in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public

occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693. In addition, their long history suggests that "those practices are not understood as conveying government approval of particular religious beliefs." *Id.* Thus, "the longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,' as well as their nonsectarian nature," indicates "that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs." *Allegheny*, 492 U.S at 630-31 (O'Connor, J., concurring). These examples of "ceremonial deism" are thus not "artificial exception[s]" from the general endorsement test. *Id.* Their acceptance under the Establishment Clause is instead the result of viewing these practices in their full context.

B. The Pledge Of Allegiance Is A Patriotic, Secular Activity That Serves Both Ceremonial And Educational Objectives.

The governmental practice challenged in this case is Elk Grove's policy of requiring daily recitation of the Pledge of Allegiance in elementary school classrooms. It is this practice that must be considered against the Establishment Clause requirements—not the addition of the words "under God" to the Pledge by federal legislators in 1954. That legislative action sheds no light on the context in which the Pledge actually is used in public schools or, more particularly, whether the context demonstrates endorsement of religion.

The full context of the words "under God" in the Pledge as recited by willing school children is shaped by a

variety of factors. The first factor is the historical accuracy of the words when used within the Pledge as a whole: the words are an accurate statement of the beliefs of many of the founders of this nation. The second element of this context is the half-century history of the recitation of the words—the "history and ubiquity" that have been recognized as an important part of the context of a practice. Third, the Pledge is a ritual that supports the ultimate mission of public schools: to create a patriotic, informed, and unified citizenry. Finally, the Pledge must be considered as part of a school's civics curriculum, which may use the Pledge along with other historical documents to teach students about history and citizenship.

1. The Pledge Of Allegiance Is A Historically Accurate Acknowledgment Of History And Democratic Views.

The importance of accurate historical teaching, including teaching about the religious views of the founders and other important figures in America's history, has been recognized by justices of this Court. Justice Powell stated in his concurrence in *Edwards v. Aguillard*, 482 U.S. 578, 606-607 (1987):

> As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Fathers' religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. . . . In fact, since religion permeates our history, a familiarity with

> the nature of religious beliefs is necessary to understand many historical as well as contemporary events.[6]

The Pledge of Allegiance accurately reflects the fact that our nation was formed by people who, by and large, believed that men "are endowed by their Creator with certain unalienable rights" and who "appeal[ed] to the Supreme Judge of the world for the rectitude of [their] intentions." UNITED STATES DECLARATION OF INDEP., 1 U.S.C. at XLIII. In 1782, six years after the signing of the Declaration of Independence, the Continental Congress adopted the Great Seal of the United States, specifically approving "Remarks and Explanation" that openly acknowledged that the eye on the reverse of the seal "allude[s] to the many signal interpositions of providence in favour of the American cause." United States Dep't of State, THE GREAT SEAL OF THE UNITED STATES 6 (1996). De Tocqueville also observed that early Americans viewed religion as "necessary to the maintenance of republican institutions." Alexis de Tocqueville, DEMOCRACY IN AMERICA 292-93 (George Lawrence trans., Harper Perennial 1988). At the time of this country's greatest crisis—the Civil War—Lincoln used in the Gettysburg Address the very words

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[6] Justice Jackson expressed similar sentiments in his concurrence in *McCollum v. Board of Education*, 333 U.S. 203, 235-36 (1948): "I should suppose it is a proper, if not an indispensable part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. . . One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared." *See also Newdow v. U.S. Congress*, 328 F.3d 466, 481-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (stating that the failure to acknowledge in some fashion the role of religion would result in a distorted impression of American history).

included in the Pledge, saying that "we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom." Garry Wills, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 263 (Touchstone/Simon & Schuster 1992). The teaching of the religious views of the early Americans also includes the study of religious tolerance as a civic virtue–a story that takes students from the persecution of the Pilgrims to Madison's Memorial and Remonstrance and the birth of the First Amendment.

Model curriculum guides from numerous states demonstrate that schools recognize the importance of teaching these documents and events accurately and in their full historical context. Teachers know that their first obligation is to help "students learn to apply and balance core democratic ideals found in the United States Constitution." Missouri Department of Elementary and Secondary Education, FRAMEWORK FOR CURRICULUM DEVELOPMENT IN SOCIAL STUDIES 3 (1996); *see also* Virginia Department of Education, DOCUMENTS OF AMERICAN HISTORY 2 (2001) (recommending that elementary school teachers give "careful study" to the foundational documents of government so that they can craft appropriate experiences suitable for young children). The obligation to provide an accurate historical context means, for example, using the Declaration of Independence to describe the beliefs of certain founders, not to teach that there is in fact a "Supreme Judge" and "Creator."

Public schools have risen to this challenge by approaching the tasks of curriculum-writing and lesson-planning with thoughtfulness and a fidelity to the principles embodied in the Constitution. Rather than use the Pledge of Allegiance to promote religion, educators use it to demonstrate that this nation is a place where

diversity is celebrated and where it is important to respect the rights of others. *See, e.g.*, Stephen L. Schecter, et al., LIVING TOGETHER CONSTITUTIONALLY: AN ELEMENTARY EDUCATION CITIZENSHIP GUIDE BASED ON THE PLEDGE OF ALLEGIANCE 5, 6, 19, 77 (New York State Commission on the Bicentennial of the United States Constitution, Albany, New York 1990) (explaining that the phrase "one nation under God, indivisible" provides educators with the opportunity to promote respect for cultural and religious differences and "to tolerate and work with those differences").

2. The Creation Of Patriotic Citizens Is An Essential Function Of The Public Schools.

The founders viewed education of children and inculcation of democratic values as essential to the survival of the nation.[7] The goal of public education is to "create Jefferson's 'safe depository of government': a civic minded, educated population, able to comprehend the complexity of public policy issues, to relate those issues to their own lives and those of others, and to make decisions with an awareness of likely consequences." Missouri Department of Elementary and Secondary Education,

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[7] *See generally* Lorraine Pangle & Thomas Pangle, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 75, 93, 96, 106-117, 125, 144, 194 (University Press of Kansas 1993) (summarizing perspectives on education espoused by Franklin, Jefferson, Adams, Rush, Webster, and others); Walter Berns, MAKING PATRIOTS 65 (University of Chicago Press 2001) ("Inculcation of love of country, like moral education generally, takes place" at an early age, which is why Jefferson proposed that the young be educated at public expense; education would render them "'worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens'").

FRAMEWORK FOR CURRICULUM DEVELOPMENT, *supra*, at 2.

This Court, time and again, has recognized that the fundamental purpose of the public schools is to prepare children for their role in society. The public school is both the "symbol of our democracy and the most pervasive means for promoting our common destiny." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (quotation omitted); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ([P]ublic education must prepare pupils for citizenship in the Republic....); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (confirming the authority of the state to require that children attend school, either public or private, and to require that teachers be of good moral character and patriotic disposition). For example, in *Ambach v. Norwick*, 441 U.S. 68 (1979), in which the Court upheld a state statute forbidding certification of teachers unless they were citizens or had agreed to apply for citizenship, the Court again acknowledged the importance of public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Id.* at 76. Education is "perhaps the most important function" of local government and provides the "very foundation of good citizenship" and of awakening children to cultural values. *Id.* at 76-77 (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

To create Jefferson's "safe depository of government," public schools must do more than merely impart the mechanics of representative democracy and the concept of separation of powers. They must instill in students a sense of pride and a desire to carry on our governmental traditions. The Pledge of Allegiance serves both ceremonial and pedagogical functions that help schools achieve these goals. An examination of these

functions demonstrates that recitation of the Pledge of Allegiance in public schools comports with the First Amendment.

3. Recitation Of The Pledge Is An Important Ritual That Helps Schools Promote Civic Knowledge and Patriotism.

Although the "symbolic and cultural side of schools is too often viewed as 'soft' or as a superficial afterthought," learning is fostered in large part by "strong traditions, frequent ritual, and poignant ceremonies to reinvigorate cultural cohesion and focus." Terence E. Deal & Kent D. Peterson, SHAPING SCHOOL CULTURE: THE HEART OF LEADERSHIP 10, 32 (Jossey-Bass 1999); *see also* Thomas Sergiovanni, MORAL LEADERSHIP: GETTING TO THE HEART OF SCHOOL IMPROVEMENT 99 (Jossey-Bass 1992) (noting general research establishing link between school effectiveness and school culture). The ceremonial aspect of the Pledge serves the secular purpose of "expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) (internal quotation marks omitted); *see also Myers v. Loudoun County Sch. Bd.*, 251 F.Supp.2d 1262 (E.D. Va. 2003) (stating that the "practical message" of the Pledge is an appreciation of the political ideologies on which the country was founded).

Modern classrooms contain children of enormous diversity in culture, readiness for learning, family background, and traditions and views regarding religion. At the beginning of the school day, the shuffle of notebooks and backpacks and the murmur of disparate voices give way to a collective act that symbolizes our

unity as citizens. Children who recite the Pledge on a regular basis are united by this ritual. Students reciting the Pledge share a common experience not only with their classmates and students at other schools, but also with the students who came before them. In addition, the Pledge reminds students each day "what is worthy of appreciation in society" as well as the overriding goal of public education—to create citizens who believe in the promise of liberty and justice for all. To satisfy these purposes, the Pledge uses language that echoes the language used in this country's founding and in many historic documents. In this context, the words "under God" do not make the Pledge a religious ritual. Instead, as Justice O'Connor discussed in *Allegheny*, the words serve to "solemniz[e]" a patriotic ritual. *Allegheny*, 492 U.S. at 625. More than just a throwaway moment after the ringing of the morning bell, the Pledge of Allegiance represents an opportunity for a classroom of children to reflect on a common purpose and national identity.

4. The Pledge Of Allegiance Is An Effective Tool For Introducing Basic Concepts Of Citizenship And Democratic Values To Students.

The Pledge serves not only a ritual purpose, but also important pedagogical objectives. Children, of course, do not show up on the first day of kindergarten ready to absorb John Locke's theory of natural rights. The classic curriculum model is one that introduces age-appropriate information and concepts and builds upon them year after year. *See generally* Peter Senge et al., SCHOOLS THAT LEARN 154-65 (Doubleday 2000) (reviewing literature regarding the cognitive development of children and explaining how children in the lower primary grades transition from thinking about their

families and friends to thinking about their communities and the world around them). In the early primary grades, students are introduced to the concept of good citizenship by learning about school rules and the notion of the classroom as a community of citizens who have rights and duties. *See, e.g.*, Virginia Department of Education, SAMPLE INSTRUCTIONAL ACTIVITIES FOR HISTORY AND SOCIAL SCIENCE (KINDERGARTEN) 13 (2002); Virginia Department of Education, SAMPLE INSTRUCTIONAL ACTIVITIES FOR HISTORY AND SOCIAL SCIENCE (GRADE ONE) 2, 13 (2002).

Classroom activities at the elementary level are designed to "convey the spirit" of complex documents such as the Declaration of Independence. Virginia Department of Education, DOCUMENTS OF AMERICAN HISTORY at 2 (2001). State-approved curricula from across the country show that the preferred method of introducing elementary-age children to concepts such as citizenship and liberty is through the study and recognition of symbols, customs, and landmarks such as the Pledge of Allegiance, the Statue of Liberty, and the Great Seal.[8]

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[8] *See, e.g.*, California Department of Education, HISTORY-SOCIAL SCIENCE CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE 3, 6, 9, 10 (1998) (stating that students will learn about the Pledge and other symbols and traditions "that provide continuity and a sense of community across time"); Kentucky Department of Education, CORE CONTENT FOR SOCIAL STUDIES ASSESSMENT, STANDARD SS-E-5.2.2 and 5.2.5 (1999) (stating that students will learn about symbols, "patriotic songs, poems (*e.g.*, Pledge of Allegiance)" and will learn about ideals of equality and personal liberty); New York Department of Education, LEARNING STANDARDS FOR SOCIAL STUDIES 25-26, STANDARD 5 (1996) (stating that students will learn "basic principles" of the Declaration of Independence and Constitution and indicating that these objectives will have been realized when, for example, students "understand the significance" of the Pledge); Pennsylvania Department of Education,

The Pledge of Allegiance is the first "formal act of citizenship" that children learn. Schecter, LIVING TOGETHER CONSTITUTIONALLY, *supra*, at 1. It is a vehicle for teaching students that "Americans are a people who may come from many different cultures but share a commitment to one common set of civic values." *Id.* at 9. "It is precisely this commitment to shared values which lends meaning to the Pledge of Allegiance and forms our national character." *Id.*

Thus, in addition to its ceremonial purpose, the Pledge lays a foundation for later, more complex learning about the ideas contained within the Pledge. As their critical thinking skills grow, students examine in depth the political, religious, and economic ideas and interests that brought about the American Revolution, and they study in detail the concepts in the Declaration of Independence and Constitution.[9] Students begin, however, with age-appropriate activities such as discussing what it would it would be like to live in a country without liberty or justice, examining why many Americans felt pride when Neil Armstrong placed the flag on the moon, or creating classroom rules to illustrate how direct democracy and representative democracy operate.[10]

Educators also recognize that the values embodied by the Pledge include the freedom not to recite the Pledge and that children "must decide with their families" whether they will participate in the Pledge. *See* Schecter, LIVING TOGETHER CONSTITUTIONALLY, *supra*, at 7, 11. Some educators even build lessons based on this Court's decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *See, e.g.*, Schecter, LIVING TOGETHER CONSTITUTIONALLY, *supra*, at 15-16 (suggesting that students "imagine that they are justices on the United States Supreme Court" and brainstorm arguments for each side in the *Barnette* case, followed by a teacher-led discussion regarding the Court's actual ruling in the case); Kansas Department of Education, A PROGRAM FOR PROVIDING PATRIOTIC EXERCISES AND INSTRUCTIONS FOR FLAG ETIQUETTE, USE AND DISPLAY 3 (2001) (recommending classroom activities based on *Barnette* to show that liberty and justice mean that citizens have a right not to pledge allegiance to the flag). These activities show that children can learn important

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ACADEMIC STANDARDS FOR HISTORY, 22 Pa. Code, Chapter 4, Appendix C, Standards 5.1.3(G), (J), and (K) (1999) (stating that students will learn to "[d]escribe the purpose" of the flag, Pledge of Allegiance, and national anthem as well as learn "the importance of respect for" the "opinions of others"); Texas Education Agency, TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES, 19 Tex. Admin. Code §113.2(b)(10), §113.3 (b)(13) §113.3(b)(12), (13) (West 2003) (stating that students will learn how symbols and customs "contribute to our national identity," explain the meaning of the Pledge of Allegiance, and explain how selected symbols and customs "reflect an American love of individualism, inventiveness, and freedom"); Virginia Department of Education, SAMPLE INSTRUCTIONAL ACTIVITIES FOR HISTORY AND SOCIAL SCIENCE (GRADE ONE) 3 (2002) (describing the role of the Pledge and other symbols in teaching civic virtues).

[9] *See, e.g.*, California Department of Education, HISTORY-SOCIAL SCIENCE CONTENT STANDARDS *supra* note 8, at 5, 6, 16, 18, 33, 34,; New York Department of Education, LEARNING STANDARDS FOR SOCIAL STUDIES, *supra* note 8, 25-29, Standard 5; Texas Education Agency, TEXAS ESSENTIAL KNOWLEDGE AND SKILLS, *supra* note 8, §§ 113.7(b)(2)-(3) & (15)-(21), §§ 113.24(b)(2)-(4), (16)-(26), § 113.35(b)(14)-(17).

[10] Kansas Department of Education, A PROGRAM FOR PROVIDING PATRIOTIC EXERCISES AND INSTRUCTIONS FOR FLAG ETIQUETTE, USE AND DISPLAY 3 (2001); California Department of Education, SYMBOLS AND LANDMARKS—NATIONAL AND LOCAL: GRADE 3 MODEL LESSON 8 (1999); Virginia Department of Education, SAMPLE INSTRUCTIONAL ACTIVITIES FOR HISTORY AND SOCIAL SCIENCE (GRADE ONE), *supra* note 8, at 14-16.

democratic concepts even by the very way in which they decide whether to recite the Pledge.

In analyzing the Pledge of Allegiance, the court of appeals erred by isolating the phrase "under God" from the remainder of the Pledge, and it erred again in isolating the Pledge from the larger context in which the Pledge is used. A proper evaluation of the Pledge, including its content and use in a school setting, demonstrates that its recitation by willing students does not violate the First Amendment.

C. Exposure To The Recitation Of The Pledge By Other Students Does Not Violate A Student's Rights Under The Establishment Clause.

This Court has recognized that there are heightened concerns with protecting students in elementary and secondary public schools from possible Establishment Clause violations. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). Because children and adolescents may be particularly susceptible to social pressure, schools must avoid actions that could, even indirectly, coerce students into participating in religious exercises. *Lee*, 505 U.S. at 593. However, this Court has made clear that social pressure is not a reason to restrict educational activities that do not constitute religious exercises. As the Court noted in *Lee*, students may be "required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these." *Lee*, 505 U.S. at 591; *see also Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987) ("Being exposed to other students performing these acts might be

offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases...."). This exposure can be "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee*, 505 U.S. at 590. It is only when the pressure involves religious exercises that the Constitution is violated.

The recitation of the Pledge of Allegiance, when considered in its entirety and in its full context, cannot be considered a religious exercise. First, the words "under God," as discussed above, are a historical statement, not a supplication, as would be the case in a prayer or similar religious exercise. Second, the words of the Pledge, read as a whole, are clearly the words of a patriotic statement, not of a religious invocation. A pledge "to the flag, and to the Republic for which it stands" are statements of allegiance to a nation and its principles, not to any religious figure or belief. This perception is strengthened by the physical acts that accompany the Pledge, such as turning to view the flag. The entire focus of the activity is the flag, which students recognize as a patriotic symbol, not as a religious one. The fact that the flag, rather than God or religion, is the focus of the Pledge, is the very reason why some religious students choose not to participate in its recitation.

The court of appeals attempted to distinguish the Pledge from other educational activities as a "performative" statement that requires the student to affirm a belief. To the extent that the court of appeals' argument rests on a particular student being forced to recite the Pledge, it is, of course, without weight because no student is required to recite the Pledge. The argument seems to rest, therefore, on a belief that hearing *other* students recite a performative statement has an effect that hearing those same students recite, for example, the

words "We hold these truths to be self-evident" does not. The court of appeals, however, did not explain the basis for its apparent conclusion.

Although inspirational documents such as the Declaration of Independence and the Gettysburg Address may not be "performative" as a grammatical matter, it is unclear why the court of appeals assumed that their recitation would have less effect on students than recitation of the Pledge. In concluding otherwise, the court of appeals drifted far afield from this Court's jurisprudence. Given the text of the Pledge and the context in which the Pledge actually is used, student exposure to other students performing this patriotic act does not give rise to the type of constitutional problem raised by religious exercises in schools.

II. Within The Bounds Of The First Amendment, Schools Must Be Permitted To Set Their Own Curricula.

A. Litigation Against Schools Over Curricular Matters Draws Resources Away From Schools For Educational Purposes.

Critics of the Pledge of Allegiance have argued that the Pledge is an ineffective vehicle for transmitting democratic values and that, in any event, these stated goals could be achieved with a pledge that does not contain the words "under God." The constitutional question, however, is not whether a school district could achieve its civic education goals with alternative approaches. Courts "cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393

U.S. 97, 104 (1968). "To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 300 (1963) (Brennan, J., concurring). So long as constitutional restrictions are honored, "it is not the business of this Court to gainsay the judgments of experts on matters of pedagogy." *Id.* at 279.

Although this case is ostensibly about a single school activity—recitation of the Pledge—its implications are far-reaching. "An extension of the school prayer cases" would not stop with the Pledge of Allegiance, but "would extend to the books, essays, tests, and discussions in every classroom." *Sherman v. Community Consol. Dist. 21*, 980 F.2d 437, 444 (7th Cir. 1992). Mr. Newdow's challenge is only one in a long line of challenges brought by parents to schools' decisions regarding educational activities. Litigation has been steady during the past two decades, with challenges to programs and teaching materials used in civic education, history, language arts, literature, biology, and health and sex education.[11]

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[11] *See, e.g., Leebaert ex. rel Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (challenging health education program); *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir. 2003) (challenging entire educational program); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir.), *cert. denied*, 534 U.S. 827 (2001) (challenging several school activities including Earth Day celebrations), the Drug Abuse Resistance Education (DARE) Program, and poetry); *Brown v. Hot, Sexy & Safer Prods. Inc.*, 68 F.3d 525 (1st Cir. 1995) (objecting to AIDS and sex education program); *Fleischfresser v. Directors of Sch. Dist.*, 200, 15 F.3d 680 (7th Cir. 1994) (challenging elementary-reading program); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (challenging history, home economics, and social studies textbooks); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (challenging reading textbooks for grades one

Several of these challenges were based on the parents' objection that the content of the program or activity conflicted with the parents' religious beliefs.[12] Courts faced with these challenges by and large have properly recognized that schools must be free to make choices if they are to fulfill their function of educating large numbers of students from diverse backgrounds.

The authority to design curriculum necessarily means that education officials must make "sensitive choices between subjects to be offered and competing areas of academic emphasis." *Board of Educ. of Island Trees v. Pico*, 457 U.S. 853, 882 n. 1 (1982) (Blackmun, J., concurring); *see also McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."). The appellate courts appropriately have concluded that parents do not have a constitutional right to individualized curriculum. *See, e.g., Sherman*, 980 F.2d at 444-445 (stating that schools are entitled to promote certain values "as worthy subjects of approval and adoption" and "to persuade even though they cannot compel," even though some students may find the discourse offensive or immoral).

through eight); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (challenging novel assigned in tenth grade English class.

[12] *See, e.g., Fleischfresser*, 15 F.3d at 683 (parents alleged that the reading selections indoctrinated their children "in values directly opposed" to their religious beliefs); *Smith*, 827 F.2d at 688 (parents alleged that textbooks promoted secular humanism and "unconstitutionally inhibited Christianity").

B. Schools Need Assurance That They Will Not Be Readily Subject To Litigation Every Time They Offer Lessons Or Activities That Refer to Religion

Although this Court has recognized that information about religion may be "integrated into the school curriculum,"[13] the decision below calls into question the circumstances under which teachers can constitutionally build lessons that focus on events or documents such as the Mayflower Compact,[14] the Declaration of Independence, and the speeches of famous Americans such as Abraham Lincoln, Patrick Henry,[15] Frederick Douglass,[16] and Martin Luther King, Jr.[17] The

[13] *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citation omitted); *see also Abington Sch. Dist. Township v. Schempp*, 374 U.S. 203, 225 (1963) ("Nothing we have said" indicates that the study of religion, "when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.")

[14] "Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plan the first colony in the northern parts of Virginia, do by these presents, solemnly and mutually in the Presence of God and one of another, covenant and combine ourselves together into a civil Body Politick." Stephen L. Schecter, et al., ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 22-23 (Madison House 1990).

[15] "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, God Almighty! I know not what course others may take; but as for me, give me liberty or give me death!" Alexandra Hanson-Harding, GREAT AMERICAN SPEECHES 14 (Scholastic Inc. 1997) .

[16] "Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence extended to us? ... Would to God, both for your sakes and ours, that an affirmative answer

concern reaches beyond the study of social studies to all subject matters. Kindergarten teachers need assurance that they can tell their pupils why the Pilgrims left England and how "Thanksgiving" became a national holiday. Speech teachers need assurance that they can require memorization and performance of great American speeches, such as the Gettysburg Address. Drama teachers need assurance that they can select a play for performance even if the play includes a scene with a religious utterance or reflection.[18] English teachers need assurance that class assignments can include studying poetry with religious references or researching the allusions in the Declaration of Independence, religious or otherwise.

This Court's jurisprudence fully supports these and similar activities when the activities are integrated into a secular curriculum. These types of activities, including the Pledge of Allegiance, do not directly and sharply conflict with basic constitutional values or constitute an endorsement of religious beliefs over non-religious beliefs.

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could be truthfully returned to these questions!" Alexandra Hanson-Harding, GREAT AMERICAN SPEECHES, *supra* note 17, at 29.

[17] Dr. King's "I Have a Dream" speech states in pertinent part: "I have a dream that one day every valley shall be engulfed, every hill shall be exalted and every mountain shall be made low, the rough places will be made plains and the crooked places will be made straight and the glory of the Lord shall be revealed and all flesh shall see it together." Alexandra Hanson-Harding, GREAT AMERICAN SPEECHES, *supra* note 17, at 79.

[18] If Mr. Newdow's argument were correct, then students in a drama program could object to having to listen to other students perform lines or acts of a religious nature that are part of the script of a play.

By recognizing the Pledge of Allegiance in its full historical and academic context as a unique patriotic exercise that serves legitimate educational and ceremonial purposes, the Court need not revisit the school prayer cases or dilute precedents that protect schoolchildren from state-sanctioned religious exercises. Because the Court's opinion in this case will be analyzed for years to come both by school boards and by individuals who wish to challenge school board policies, specific guidance from this Court regarding the constitutional parameters of educational decision-making, and a reaffirmance of schools' authority to make choices within constitutional boundaries, will help reduce the likelihood of future litigation over a variety of curricular choices.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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